

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPLICATION NO.1796 OF 2022
IN
CRIMINAL APPEAL NO.413 OF 2022

SHOYAB DILAWAR SHAIKH
VERSUS
THE STATE OF MAHARASHTRA AND ANOTHER

...
Advocate for Appellant : Mr. Temkar Rajendra K.
APP for Respondent : Mr. R D Sanap

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CORAM : SHRIKANT D. KULKARNI, J.
Dated : September 16, 2022

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PER COURT :-

1. It is an application for suspension of sentence and bail moved by the applicant.

2. Heard Mr. Temkar, learned counsel for the applicant, Mr. Sanap learned APP for the State/Respondent no.1 and Mr. Nagarsoge, learned counsel (appointed) for respondent no.2.

3. Mr. Temkar, learned counsel for the applicant invited my attention to the impugned judgment and order of conviction passed by the learned Additional Sessions Judge, Sangamner in Sessions Case no.64 of 2016. He further invited my attention to the copies of depositions of victim

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girl, father of the victim, Medical Officer and Police Station officer, who has recorded the FIR. He pointed out that the prosecution has miserably failed to prove the age of the victim girl on the date of the alleged incident. No witness is examined even, from the school regarding birth date of the victim girl. He submitted that, the learned Additional Sessions Judge has committed an error in relying upon the school leaving certificate wherein date of birth of the prosecutrix is mentioned.

4. He submitted that, according to the provisions of Protection of Children from Sexual Offences Act, 2012 (for short POCSO Act), it was incumbent upon the prosecution to examine the witness to prove what was the exact age of the prosecutrix on the date of the incident. He, therefore, submitted that finding recorded by the learned Additional Sessions Judge is erroneous.

5. He further invited my attention to the evidence of two witnesses. Learned counsel submitted that, Medical officer Dr. Sneha Gote has stated in her evidence that there was no injury on private part of the victim girl. Victim girl had not sustained injuries on her person. Medical certificate nowhere indicates sexual assault on the victim. He, aaa/-

therefore, submitted that, the findings recorded by the Additional Sessions Judge thereby convicting the applicant u/s 366-A, 376 of the IPC coupled with POCSO Act is completely erroneous.

6. Learned counsel for the applicant further invited my attention to the evidence of victim girl and her statement recorded by the Magistrate under section 164 of the CrP.C. and pointed out that there is material variance. Victim girl has changed her stand. In her statement recorded before the Magistrate she has admitted that she has love affair with the applicant and both of them ran away from the house and stayed at various places. She has not disclosed before the Magistrate that there was any physical relations between them. However, subsequently, she has stated before the Court that there was physical relations; which is not supported by the medical evidence. He further invited my attention to the evidence of father of victim girl and pointed out as to how his evidence is again at variance. He has even denied portion marked 'A' out of his FIR. It is nowhere stated in the FIR that there was sexual assault on his daughter.

7. Learned counsel for the appellant submitted that, present appellant was on bail during the trial and in the
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interregnum period, he was taken into custody and again released on bail. After conviction, he has been taken into custody. There are no extra ordinary circumstances to keep the appellant behind bars when no case is made out for misuse of liberty. He, therefore, urged to grant bail to the appellant/applicant by suspending the substantive sentence.

8. Mr. Sanap, learned APP for the State and Mr. Nagarsoge, learned counsel appointed for respondent no.2 strongly opposed to allow this application. Both of them submitted that, the learned Additional Sessions Judge was pleased to hold the applicant guilty under heinous offences coupled with the provisions of the POCSO Act. The applicant alleged to have committed sexual assault on a minor girl. They further pointed out that the learned Additional Sessions Judge has also committed an error in awarding the sentence against the applicant u/s 376 of the IPC. According to Amendment of 2018 to section 376 of the IPC, it was necessary on the part of the Additional Sessions Judge to award at least Ten years sentence, which is mandatory and not below that. Both of them, submitted that it is not a fit case to release the applicant on bail by suspending the substantive sentence.

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9. Mr. Nagarsoge, learned counsel for respondent no.2 has placed his reliance on following two citations while opposing the appeal.

i. State of Madhya Pradesh Vs. Preetam
reported in **2018 AIR (SC) 4212.**

ii. Ganesan Vs. State represented by the
Inspector of Police reported in **2020 (10)**
SCC 573.

10. I have considered the submissions of both sides and I have also gone through the evidence of first informant, victim girl, medical officer and PSO, who has recorded the FIR so also the medical examination certificate of the victim girl.

11. It appears from the operative part of the order rendered by the Additional Sessions Judge in Sessions Case no.64 of 2016 that the appellant was on bail during the trial and after conviction he has been taken to custody. It is not the case of the prosecution that the appellant has misused his liberty during the trial. For interregnum period, he was taken to custody, but subsequently, he seems to have been released on bail as per the impugned judgment and order rendered by the trial court.

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12. So far as the citations relied upon by the learned counsel for the respondent no.2 are concerned, those would be helpful while deciding the appeal finally on its own merits, which focus light on the determination of the age of the victim girl and credibility of the sole evidence of the prosecutrix victim-girl while convicting accused u/s 376 of the IPC. That exercise would be made at the time of final hearing of appeal.

13. Now, I have to see whether the applicant has made out a case to grant bail by suspending the substantive sentence. On perusing the evidence of the victim girl alongwith her statement recorded under section 164 of the Cr.P.C., one would reveal that there is material variance between the statement of victim girl recorded before the Magistrate u/s 164 of the CrPC and evidence before the Court. It would reveal clear picture. There was love affair between the victim girl and this appellant. Both of them ran away from their respective places and resided at various places. Victim girl has nowhere stated before the Magistrate that she was induced by the applicant or put pressure on her so as to left the company of her parents. She seems to have changed her stand as per her convenience while tendering her evidence

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before the Court and thereby raised question mark about her trustworthiness and credibility. Another important aspect is about medical evidence. On going through the testimony of Medical Officer Dr. Sneha, it would reveal that Dr. Sneha did not find any injury on private part of the victim girl. Even, no injuries were found on the person of the victim girl at the time of examination. As such, prima facie, medical evidence is not extending any help to the prosecution case.

14. So far as the FIR which is lodged by the Father of the victim girl and his evidence before the court are taken into consideration again there is variance which goes to the root of the case. Father of the victim has gone to the extent by denying portion marked as "A" out of his FIR. Under these circumstances, there is no propriety to keep the applicant behind bars. As pointed out earlier, the applicant was on bail during Trial. There are no extra ordinary circumstances to keep the applicant behind bars. At the cost of repetition, it may be placed on record that it was a love affair between the victim girl and the applicant and both of them have left their house on their own and resided at various places and subsequently victim girl had changed her stand. Under these

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circumstances, it is necessary to grant bail to the applicant by suspending the substantive sentence.

ORDER

- i. The application is hereby allowed.
- ii. The execution of substantive sentence passed against the applicant in Sessions Case No.64 of 2016 by the Additional Sessions Judge, Sangamner, dated 26.5.2022 is hereby suspended till final decision of the appeal.
- iii. The applicant/original accused shall be released on bail on his furnishing PR Bond in the sum of Rs.20,000/- (Rs. Twenty Thousand) with one or two solvent sureties of the like amount on the following conditions :-
 - a] He shall furnish his in-detail address with Cell number before the trial court.
 - b] He shall **deposit entire fine amount** before the trial court.
 - c] The trial court shall issue release order **only** after depositing the fine amount by the applicant/accused.

- iv] Bail before the trial court.
- v] Professional fees of Advocate Mr. Nagarsoge, is quantified at Rs.5,000/- since he is appointed to espouse the cause of respondent no.2. The Secretary of the High Court Legal Service Sub-Committee, Aurangabad is hereby requested to make payment of the professional fees to the counsel, so appointed.
- vi. Criminal application is accordingly disposed off.

(SHRIKANT D. KULKARNI, J.)

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